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No. 09-494

IN THE

Supreme Court of the United States

JERRY CRAWFORD; CHARLES ANNABEL; DARRYL BALLARD; MATTHEW BURDO; DON HOSKINS, ROY LANNING; PETER POWELL, WANDA SIMPSON, DANIEL SLANE, PETITIONERS

v.

TRW AUTOMOTIVE U.S. LLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

JEANNE MIRER
Counsel of Record

Eisner & Mirer P.C.
113 University Place,
8th Floor
New York, NY 10003
(212) 473-8700

CURRY & TAYLOR ♦ (202) 393-4141

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Petitioners are a class of workers who lost their jobs and their rights to accrue further pension benefits and other benefits when Respondent TRW closed its plant on Van Dyke Road in Sterling Heights Michigan in 2006. They claim the Respondent violated their rights under section 510 of ERISA because the decision to close the plant was made with the specific intent to interfere with their attainment of rights to which they would have been entitled had the plant not closed. Respondent claimed the decision to close Van Dyke was due to overcapacity, whereas Petitioners alleged that the claimed overcapacity was a pretext and that Respondents could have cured the overcapacity by placing a large module contract from Daimler Chrysler at the Van Dyke plant as originally planned instead of placing it at a newly built alter ego plant a few miles away on Mancini Drive. In its Opposition Brief, Respondent makes factual and legal arguments which require some limited reply.

Petitioners, therefore, reply to the facts and legal arguments stated by Respondent in its Opposition as follows.

I. REPLY TO FACTUAL INACCURACIES

A. In an attempt to claim that TRW never intended to place the module work from Daimler Chrysler (DCX) at the Van Dyke plant, (as if this fact would make a difference as to any of its later arguments) Respondent claims on page 5 of its Opposition that it was Daimler Chrysler (DCX) which initially suggested the module contract be placed at the Van Dyke Plant. There is no evidence from DCX in the record supporting this. What is clear from the record is

that the September 22, 2004 bid correspondence from Howard Puuri (TRW's Director of Customer Development) to Mr. Cody at DCX shows the assembly location of the module work to service DCX's Sterling Heights Assembly Plant, was TRW's Sterling Heights Plant at 34201 Van Dyke. (Exhibit 1,# *06428*).

Two days after this correspondence, i.e., September 24, 2004, the North American Braking & Suspension Restructuring Plan was unveiled which expressed a negative view towards employees with "heritage costs..." (Exhibit 2, *#05081*) and called for a reduction in the number of workers with these costs.

About one month after this restructuring plan(on October 27, 2004) Mr. Puuri submitted an updated bid letter to DCX which stated that the TRW module assembly work be done in Sterling Heights would be done at "an existing (Van Dyke) or leased plant." (Exhibit 3, *#06477)*

Thus, within a few weeks after adopting a restructuring plan which targeted heritage cost laden employees such as Petitioners, TRW gave itself the option to place the Sterling Heights for DCX work at either an "existing (Van Dyke) or a leased plant". Respondent does not claim DCX asked that it be changed.

B. Respondent claims that the decisions to put the module work at Mancini Drive and to close Van Dyke were separate decisions as if that fact was indicative of the lack of specific intent to eliminate the Van Dyke employees who had "heritage costs". Respondent admitted, however, that they had secured

the module contract before the decision was made to close the Van Dyke plant. See, Respondent's Exhibit 20, Muckley dep. p. 156, ROA 681. Thus, this case does not present a situation where the decision to close had been made and then new business was obtained requiring a change in decision. The Respondent clearly had the module contract when it made the decision to close Van Dyke and place the work at Mancini Drive.

C. Respondent claims that closing the plant cost $15 Million, of which $9.7 million was curtailment cost. However, Respondent only cited a partial document to support those figures. The full document shows that after further audit and validation the curtailment costs for including pension and medical had been reduced to $6.6 Million, or a 63% reduction from the initial estimated $17.9 million in 2003 and the pre-audit $9.7 Million referred to by Respondent. See, Petitioner's Exhibit 5, *#07749*.[1]

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[1]Respondent at page 18 of its Opposition claims that Petitioners misrepresented the testimony of Bruce Hoover. Respondent claims that on page 14 of their brief on appeal Petitioners claimed that Hoover considered curtailment gains and losses in determining where to place the module business. Page 14 of Petitioner's Brief on Appeal does not address this issue and it is not clear this issue was raised by Petitioners below. Whether Hoover knew of the specific curtailment analysis at Van Dyke being reduced to the point that closure was possible does not matter. It is evident from Hoover's March 23rd email to Michelle Hill that the Company considered the size of the curtailment costs, (i.e. the benefits it could obtain from immediately paying to extinguish rights of employees to future benefit costs) was the major factor in a decision to close a plant. Indeed, in this email, Hoover states unequivocally that the curtailment costs at one of its Canadian plants was too prohibitive to consider closing it. (Exhibit 7 *#06830*). This is the same document in which Hoover states that Howard Puuri is still saying the module work was going to the Van

D. Respondent claims it did not agree to any requests of the union to grant any additional pension credits to any of the Petitioners because the union refused to compromise on any requests by the company. The reality is the only concession the Company sought in the negotiations with the union was to eliminate its obligations for retiree medical costs. This evidence supports the Petitioners claim that the closing was directed at their ERISA protected benefits because it shows TRW was not satisfied with merely cutting off active employees from accruing further rights to pensions or retiree medical, but that it also wanted to get the union to give away the retiree medical benefits enjoyed by the existing retirees had.[2]

II. REPLY TO LEGAL ARGUMENTS

A. APPLICABILITY OF ERISA 510 TO LAY OFF AND RECALL DECISIONS AND EVIDENCE TO SUPPORT THE CLAIMS OF CRAWFORD, HOSKINS AND POWELL.

The Respondent claims that Petitioners' misrepresent the holding of the District Court and Court of Appeals as to whether ERISA 510 applies to decisions on layoffs or recalls. While it is true that the District Court seemed, on reconsideration, to accept

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Dyke Plant. (Exhibit 7 *#06831*).

[2]Indeed, consistent with the company plan to eliminate employees with heritage costs, the company made reduction of these costs the "centerpiece" of its strategy at Van Dyke. (Exhibit 5, *#07746*). Furthermore, in January of 2006 during the negotiations, the company President Mr. Plant specifically stated he would not allow any "bridging" of employees to the 30 year level as this would cost them money associated with the benefits. (Exhibit 18, *#07717*).

that ERISA 510 reached decisions not to recall an employee where that decision was based on an intention to interfere with the employee attaining ERISA protected rights, the Court of Appeals was less clear. In the context of a plant closing, where the failure to recall an employee interferes with that employee's ability to accrue significant benefits before the plant closes, the company has effectively discharged the employee or discriminated against him/her.

In both courts the claims of the three individuals failed because the courts stated there was no evidence to support a claim that TRW considered eligibility for ERISA benefits when deciding not to recall anyone. This finding is so far from the accepted and usual judicial proceedings that this court should consider reversing the findings on these facts. That is, before the court were documents showing that TRW had analyzed how close all employees were to full vesting, (ROA, Respondent's Exhibit 26, 694-701) and emails showing (a) a hostility to bridging any employees, and (2) emails after March of 2006 stating no one should be recalled. It is difficult to imagine more direct evidence that TRW wanted no one else crossing the 30 year threshold. Both lower courts below egregiously violated the rules regarding giving the non moving party the benefit of favorable inferences from the evidence.

B. MIXED MOTIVE

The Respondent claims this Court should not address the mixed motive issue for two reasons: (1) the issue was not raised below, and (2) that employers are not prohibited from considering costs of ERISA

benefits before making business decisions.

As to the first reason, Respondent acknowledges that *Singleton v Wulff* , 428 U.S. 106 (1976) does not prohibit this Court from this court from considering issues not addressed in the lower courts. The rationale for the general rule for not considering issues not addressed in the lower courts, was stated in *Hormel v Helvering,* 312 U.S. 552 (1941). That rationale does not apply in the present case. In *Hormel* this Court found because it is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . (and) in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence", issues not ruled on by the lower courts should not generally be addressed on appeal. In this case, the Petitioners submitted evidence to support their claims of intentional interference and the Respondent submitted evidence and its alleged legitimate non interfering reasons for its actions. In this case, it is the allocation of the burden of proof which is at issue, and not the evidence.

As to the second reason, the law **does prohibit** employers from considering the cost of pensions in making some business decisions including the one in this case. The cases cited by Respondent and referenced by the lower courts are instances where the court found that either the company had not considered pensions costs in a business decision, *Smith v Ameritech*, 129 F.3d 857, (6th Cir. 1997), or that there was no evidence presented that a desire to avoid retirement benefit liability was a determining factor in

the adverse action, *Majewski v Automatic Data Processing Inc.* 274 F.3d 1106 (6th Cir. 2001), or loss of pension benefits was incidental to loss of employment, *Daughtrey v Honeywell Inc.*, 3 F.3d 1488, (11th Cir. 1993). But in this case both the District and the Appeals Court had to admit that TRW had used the cost of pensions in making the decisions to close the Van Dyke Plant.

In the District Court, despite all the evidence showing TRW's desire to rid itself of heritage cost laden employees, Respondent claimed overcapacity as the reason for closing the Van Dyke plant and stated its reasons such as inadequate ingress and egress, etc, as to why it did not cure the overcapacity problem by placing the module and other work it had successfully bid on in the Van Dyke Plant.

The District Court then refused to allow Petitioners to challenge the credibility or reasonableness of Respondent's reasons for not placing new work or the module work in the Van Dyke plant claiming Petitioners could not question Respondent's "business judgment" to prove pretext. While the Court of Appeals did not agree that TRW's "business judgment" could not be questioned the Court erroneously assumed that the only relevant evidence that Petitioners could use to support their claims was that they were "close" to vesting when the company made the decision to close. While temporal proximity to vesting may show intent to interfere in some cases, such evidence is not necessary where the allegation is not interference with vesting but with "attainment of any right" e.g. to a higher pension. See *Majewski, supra*, at 1113. After finding that Petitioners had

pointed to testimony and a variety of documents showing TRW's "desire to reduce pension costs and reducing those costs played a definite role in TRW's decision to shut down Van Dyke" (and that TRW had not denied this) (12a), the Court ruled against Petitioners because they could not carry **their burden of persuasion** of a 510 violation because a majority of the Petitioners needed more than 5 years to attain benefits associated with 30 years of pension credit.

In both the District Court and the Court of Appeals the Court set up a hurdle of evidence that Petitioners could not clear by continuing to **place the burden on them** once it was already proven and admitted by TRW that "desire to reduce pension costs played a definite role in the decision to shut down Van Dyke". This is the precise context in which the mixed motive analysis should be used and in which TRW would have to prove, like the defendant in *Gavalik v Continental Can Co.*, 812 F.2d 834, (3rd Cir 1987), that the same result would have happened had the desire to reduce pension costs not played a role in the decision to close Van Dyke.[3]

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[3]Respondent in footnote 6 on page 20 of its Opposition claims that the Financial Accounting Standards Board requires the consideration of these costs. This is untrue. Standard 88 addresses merely show how such gains or losses are to be reported for tax purposes. They have nothing to do with a company deciding to close a plant and cut off the rights of active employees to future accruals of benefits through figuring out how much it would gain or lose by closing the plant. The fact that many of the documents show plans to turn the curtailment losses at Van Dyke into a gain by combining its closure with two other plants, is clear evidence of intent to interfere. It does not militate against a finding of specific intent that TRW paid restructuring costs when it closed the plant. To the contrary, it shows a company dedicated

C. ALTER EGO

Respondent claims, on page 22, that the Mancini Drive Plant could not be the alter ego of the Van Dyke Plant because the doctrine does not apply in the context of different facilities of the same employer and that Petitioners had cited no case holding such. This is not true. Petitioners cited below and cite again herein the doctrine of *double breasting*, which applies in situations like the present where the same employer will set up a non union facility to do work that the union facility could have had. See *NLRB v Fullerton Transfer & Storage Ltd. Inc.*, 910 F.2d 331 (6th Cir. 1990). A double breasted alter ego is the same as an alter ego where there is clearly an attempt to disguise the new owner. Not only was Mancini Drive an alter ego of Van Dyke, the fact that TRW changed from sourcing the module work from Van Dyke to this new plant is further evidence of TRW's specific intent to rid itself of is heritage cost laden employees and thus interfere with Petitioners rights under section 510.

CONCLUSION

For the reasons stated here and in the initial Petition for Certiorari, this Court should grant the writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

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to doing away with employees with heritage costs so it will benefit from not having those workers in its workforce in the future.

EISNER & MIRER, P.C.
113 University Place, 8th Flr.
New York, New York10003
JEANNE E. MIRER
(Counsel of Record)
(212) 473-8700